

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1906.

No. 1679.

LAWRENCE S. NICOLAI, APPELLANT,

vs.

THOMAS GALLOWAY AND THOMAS F. GALLOWAY,
TRADING AS GALLOWAY & SON; THOMAS W. SMITH,
AND JAMES B. LAMBIE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia.

No. 1679.

LAWRENCE S. NICOLAI, Appellant,

vs.

THOMAS GALLOWAY ET AL.

a Supreme Court of the District of Columbia.

No. 47624. Law.

LAWRENCE S. NICOLAI, Plaintiff,

vs.

THOMAS GALLOWAY and THOMAS F. GALLOWAY, Trading as Galloway & Son, and THOMAS W. SMITH and JAMES B. LAMBIE, Defendants.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, that in the Supreme Court of the District of Columbia, at the city of Washington in said District, at the times hereinafter mentioned, the following papers were filed, and proceedings had, in the above-entitled cause, to-wit:

1 *Declaration.*

Filed April 5, 1905.

In the Supreme Court of the District of Columbia.

Law. No. 47624.

LAWRENCE S. NICOLAI, Plaintiff,

vs.

THOMAS GALLOWAY and THOMAS F. GALLOWAY, Trading as Galloway & Son, and THOMAS W. SMITH and JAMES B. LAMBIE, Defendants.

The plaintiff, Lawrence S. Nicolai, through his Attorneys, sues the defendants, Thomas Galloway and Thomas F. Galloway, trading as Galloway & Son, and Thomas W. Smith and James B. Lambie, for that heretofore, to wit, on the 10th day of December, A. D., 1902, the defendants by a certain Bond or written obligation, dated on that day and sealed with their seals—a copy of which is annexed

to this Declaration, marked "Exhibit B" and made a part hereof and now shown to the Court here—acknowledge themselves, and each of them, to be held and firmly bound unto the plaintiff in the sum of Five Thousand Dollars (\$5000) to be paid to the said plaintiff; which said Bond or written obligation was and is subject to a certain condition therein written, whereby it was provided that if the said Thomas Galloway and Thomas F. Galloway, trading as Galloway & Son, should well and truly perform all the obligations and covenants specified in a certain contract in writing, made and entered into by and between them and the plaintiff herein on the said 10th day of December, 1902, according to the true letter and spirit of the same, a copy of which said contract is annexed hereto, marked "Exhibit A," and now shown to the Court here, wherein the said Thomas Galloway and Thomas F. Galloway, trading as Galloway & Son, contracted with the plaintiff to construct and complete a certain brick dwelling agreeable to plans and specifications prepared for said dwelling by B. S. Simmons, Architect, for the sum of Nine Thousand Eight Hundred and Sixty-four and Forty-four Hundredths Dollars (\$9,864.44), and deliver the brick dwelling referred to and provided for in said contract free from all material or labor liens, then said Bond or written obligation should be null and void; otherwise to remain in full force and virtue in law.

Nevertheless, the said plaintiff says that after the making of the said Bond or written obligation by the defendants, and although the plaintiff faithfully and promptly performed all the covenants and conditions of said contract by him to be performed, the said Thomas Galloway and Thomas F. Galloway, trading as Galloway & Son, failed and neglected to perform said obligations and covenants in the said contract made and entered into by them with the plaintiff, and failed and neglected to construct and complete said dwelling agreeably to the said plans and specifications on or before the time prescribed for the completion of the same in said contract, and ceased all work upon said brick dwelling and abandoned and left the same in an unfinished and incompleated condition; by which said neglect and failure on the part of said Thomas Galloway and Thomas F. Galloway, trading as Galloway & Son, to complete said brick dwelling as aforesaid, according to the obligations and covenants of said contract, the plaintiff was compelled to, and with the approval of the defendants did complete and finish the said brick dwelling in accordance with the terms and provisions of said contract and the plans and specifications provided for thereunder; in consequence of which said neglect and failure as aforesaid, and the default of said Thomas Galloway and Thomas F. Galloway, trading as Galloway & Son, under said contract, which made it necessary for the plaintiff to finish and complete said dwelling, he has been forced and compelled to pay out and expend, and has therefore lost, a large sum of money in excess of the amount contracted to be paid under the provisions of said contract, to wit, the sum of One Thousand Four Hundred Ninety-seven and Sixteen Hundredths Dollars (\$1,497.16), as will more fully appear by reference to the

"Bill of Particulars" annexed hereto and made a part of this Declaration, which said sum of money, by reason of the several premises aforesaid, and of said Bond and contract, the defendants owe and are bound to pay to this plaintiff; yet the plaintiff says that the defendants, although often requested so to do, have not as yet paid the said sum of One Thousand Four Hundred Ninety-seven and Sixteen Hundredths Dollars (\$1,497.16), or any part thereof, but have wholly neglected and refused and still do neglect and refuse so to do, by reason of which an action has accrued to the plaintiff in the sum of One Thousand Four Hundred Ninety-seven and Sixteen Hundredths Dollars (\$1,497.16) and interest.

4 Wherefore, the plaintiff brings this suit and claims the sum of One Thousand Four Hundred Ninety-seven and Sixteen Hundredths Dollars (\$1,497.16) with interest from January 20th, 1904, besides the costs of this suit.

LECKIE, FULTON & COX,
Attorneys for Plaintiff.

Notice to Plead.

The defendants are to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, after the day of the service hereof; otherwise judgment.

LECKIE, FULTON & COX,
Attorneys for Plaintiff.

5

"EXHIBIT A."

Contract.

Filed April 5, 1905.

This agreement, made the Tenth day of December in the year one thousand nine hundred and two by and between Thos. Galloway and Thomas F. Galloway known as and trading under the firm name of Galloway and Son of Washington D. C. party of the first part (hereinafter designated the Contractor), and Lawrence S. Nicolai of the same place party of the second part (hereinafter designated the Owner),

Witnesseth that the Contractors, in consideration of the agreements herein made by the Owner agree with the said Owner as follows:

Article I. The Contractor shall and will provide all the materials and perform all the work for the erection and Completion of one three story and Cellar brick dwelling to be built on Lot numbered two hundred and one (201) Lanier Heights as recorded in book County Sixteen (16) page Fifty two (52) in the office of the Surveyor for the District of Columbia as shown on the drawings and described in the specifications prepared by B. S. Simmons Archi-

teet, which drawings and specifications are identified by the signatures of the parties hereto, and become hereby a part of this contract.

Art. II. It is understood and agreed by and between the parties hereto that the work included in this contract is to be done
6 under the direction of the said Architect, and that his decision as to the true construction and meaning of the drawings and specifications shall be final. It is also understood and agreed by and between the parties hereto that such additional drawings and explanations as may be necessary to detail and illustrate the work to be done are to be furnished by said Architect, and they agree to conform to and abide by the same so far as they may be consistent with the purpose and intent of the original drawings and specifications referred to in Art. I.

It is further understood and agreed by the parties hereto that any and all drawings and specifications prepared for the purposes of this contract by the said Architect are and remain his property, and that all charges for the use of the same, and for the services of said Architect are to be paid by the said Owner.

Art. III. No alterations shall be made in the work except upon written order of the Architect: the amount to be paid by the Owner or allowed by the Contractors by virtue of such alterations to be stated in said order. Should the Owner and Contractors not agree as to amount to be paid or allowed, the work shall go — under the order required above, and in case of failure to agree, the determination of said amount shall be referred to arbitration, as provided for in Art. XII of this contract.

Art. IV. The Contractors shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the Architect or his authorized representatives: shall, within twenty-four hours
7 after receiving written notice from the Architect to that effect, proceed to remove from the grounds or buildings all materials condemned by him whether worked or unworked, and to take down all portions of the work which the Architect shall by like written notice condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications, and shall make good all work damaged or destroyed thereby.

Art. V. Should the Contractors at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the Architect, the Owner shall be at liberty after ten days' written notice to the Contractors, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the Contractors under this contract: and if the Architect shall certify that such refusal, neglect or failure is sufficient ground for such action, the Owner shall also be at liberty to terminate the employment of the Contractors for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon, and to employ any other per-

son or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the Contractors, they shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to

8 be paid under the contract shall exceed the expense incurred by the Owner in finishing the work, such excess shall be paid by the Owner to the Contractors; but if such expense shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner. The expense incurred by the Owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the Architect, whose certificate thereof shall be conclusive upon the parties.

Art. VI. The Contractors shall complete the several portions, and the whole of the work comprehended in this agreement by and at the time or times hereinafter stated, to wit:

The entire building to be finished and delivered ready for occupancy on or before the first day of June one Thousand nine hundred and three.

Art. VII. Should the Contractors be delayed in the prosecution or completion of the work by the act, neglect or default of the Owner, of the Architect, or of any other contractors, employed by the Owner upon the work, or by any damage caused by fire, lightning, earthquake, cyclone or weather other casualty for which the Contractors are not responsible, or by strikes or lockouts caused by acts of employees, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid, which extended period shall be determined and fixed by the Architect; but no such allowance shall be made unless a claim therefor is presented in writing to the Architect within forty-eight hours of the occurrence of such delay.

9 Art. VIII. The Owner agrees to provide all labor and materials essential to the conduct of this work not included in this contract in such manner as not to delay its progress, and in the event of failure so to do, thereby causing loss to the Contractors, agrees that he will reimburse the Contractor for such loss; and the Contractors agree that if they shall delay the progress of the work so as to cause loss for which the Owner shall become liable, then they shall reimburse the Owner for such loss. Should the Owner and Contractors fail to agree as to the amount of loss comprehended in this Article, the determination of the amount shall be referred to arbitration as provided in Art. XII of this contract.

Art. IX. It is hereby mutually agreed between the parties hereto that the sum to be paid by the Owner to the Contractor for said work and materials shall be Nine Thousand eight hundred and Sixty four 44 100 \$9,864.44 100 Dollars subject to additions and deductions as hereinbefore provided, and that such sum shall be paid by the Owner to the Contractors, in current funds, and only upon certificates of the Architect, as follows:

First	payment	1000	When the first tier of Joist are in place.
2nd	"	1000	" " second " " " " "
3rd	"	1000	" " 3rd " " " " "
4th	"	1000	" " Building is under roof.
5th	"	1000	" " " ready for plaster.
6th	"	1500	" " plastered.
7th	"	1300	" " trimmed out.
8th	"	2064 14 100	When Building is completed.

10 The final payment shall be made within Ten days after the completion of the work included in this contract, and all payments shall be due when certificates for the same are issued.

If at any time there shall be evidence of any lien or claim for which, if established, the Owner of the said premises might become liable, and which is chargeable to the Contractors, the Owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify him against such lien or claim. Should there prove to be any such claim after all payments are made, the Contractors shall refund to the Owner all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the Contractor's default.

Art. X. It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

Art. XI. The Contractors shall during the progress of the work maintain insurance on said work, in their own name and in the name of the Owners, against loss or damage by fire, lightning, earthquake, cyclone or other casualty. The policies to cover all work incorporated in the building, and all materials for the same in or about the premises, and shall be made payable to the parties hereto, as their interest may appear.

11 Art. XII. In case the Owner and Contractors fail to agree in relation to matters of payment, allowance or loss referred to in Arts. III or VIII of this contract, or should either of them dissent from the decision of the Architect referred to in Art. VII of this Contract, which dissent shall have been filed in writing with the Architect within ten days of the announcement of such decision, then the matter shall be referred to a Board of Arbitration consisting of one man to be selected in behalf of the Owner, and one man in behalf of the Contractor, these two to select a third. The decision of any two of this Board shall be final and binding on both parties hereto. In event of the death or inability to serve of the party named in behalf of the Owner, then the Owner shall select a person in his place; in event of the death or inability to serve of the party named in behalf of the Contractors, then the Contractors shall select a person in his place; in event of the death or inability to serve of the third party, then the remaining arbitrators shall choose a person

in his place. Each party shall pay one-half of the expense of such reference.

Art. XIII. The said parties for themselves, their heirs, successors, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained.

12 In witness whereof, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

THOMAS GALLOWAY.	[SEAL.]
T. F. GALLOWAY.	[SEAL.]
L. S. NICOLAI.	[SEAL.]

In presence of
GEORGE W. JOHNSON.
MARK N. GASTON.

Witness to
L. S. NICOLAI.
JNO. D. FAY.
J. P. McMAHON.

13 "EXHIBIT B."

Bond.

Filed April 5, 1905.

Know all men by these presents: That we Thos. Galloway and Thomas F. Galloway Trading as Galloway & Son, principals and Thos. W. Smith and James B. Lambie as Sureties are held and firmly bound unto Lawrence S. Nicolai his successors or assigns, in the sum of Five Thousand (\$5000) Dollars, for which payment, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators or assigns, jointly and severally, firmly by these presents.

Whereas, The said Thos. Galloway and Thomas F. Galloway trading and known as Galloway & Son has contracted with Said Lawrence S. Nicolai to execute, construct, and complete one Three-Story and Cellor Brick dwelling to be located on Lot Number (201) Lanier Heights as recorded in book County sixteen (16) page (52) in the office of the survey for the District of Columbia, Agreeable to plans and Specifications prepared for said dwelling by B. S. Simmons Architect for the sum of Nine Thousand eight Hundred and Sixty-four 44/100 \$9864 44/100 Dollars, by a contract dated the Tenth day of December, A. D., 1902, and for the fulfilment of which this Bond is given: Now, the condition of this obligation is that if the said Thos. Galloway & Thos. F. Galloway (Galloway & Son) shall well and truly perform all the obligations and covenants specified in said contract according to the true letter and spirit of the same, and deliver the building free from all material or
14 labor liens for Materials or labor-s furnished or used within or about the Said building or premises then this obligation

is to be null and void; otherwise to remain in full force and virtue in law.

In witness whereof, We have hereunto set our hand and seal this Tenth day of December, A. D. 1902.

THOMAS GALLOWAY.	[SEAL.]
T. F. GALLOWAY.	[SEAL.]
THOS. W. SMITH.	[SEAL.]
JAMES B. LAMBIE.	[SEAL.]

Signed, sealed and delivered in presence of:—

GEORGE W. JOHNSTON.
MARK N. GASTON.
W. A. MIDDLETON.
CHARLES R. DULAY.

15

Bill of Particulars.

Filed April 5, 1905.

Statement Showing Expenditures by L. S. Nicolai in the Construction of Brick Dwelling on Lot No. 201, Lanier Heights, and Excess of Such Expenditures Over Contract Price.

Total Amount paid Galloway & Son under Contract of December 10, 1902.....	\$5000.00
Amount paid for mantles, gas fixtures and papering— included in estimate, but to be paid by Owner as per contract & specifications.....	350.00

Amount paid out to complete building after abandonment by Galloway & Son:

To F. C. Giesking for Insurance on Building..	\$7.50
To Thos. E. Landon for Plastering Building..	712.00
To Washington Gas Co. for running Gas Service	18.50
To Barber & Ross for Tile work in Build- ing	103.00
To George W. Turnburke for Painting in Building	420.00
To Thos. R. Riley for Rough Lumber in Build- ing	74.17
To Irwin J. French & Co. on a/c Plumbing & Etc.	1079.33
To W. T. Galliher & Bro. for Lumber in Building	94.60
To Wm. H. Dyer for Dressed Lumber in Bldg	32.06
To Gurney Heating Co. for Hot Water Boiler	123.00
To W. M. Whyte for Gal. Iron Work on Bldg	42.25
To Thos W. Smith for Lumber in Building	89.39

To Chas J. Fanning for Slate Work on Bldg	59.86	
16 To Warren & Dyer for Glazing Win- dows in Building.....	140.50	
To Louis Hartig for Hardware furnished Building	97.85	
To W. H. Chappel for Stone Work in Bldg	111.00	
To Fahey and Co. for Concreting and exca- vating	185.00	
To Jas. Martin for finishing Brickwork on Bldg	348.00	
To C. P. Kluckhuhn and Bro. for electric wiring	108.00	
To W. B. Moses and Sons for Grille work in Bldg	35.90	
To R. S. Hazell and Bro. for Carpenter's work	835.50	
To Adams, Monroe Mfg. Co. for Dressed Lumber	593.44	
To Mattison & Keasebey Co. for covering Pipes	75.00	
To Cyrus B. Rees for Radiators and Extra work	156.60	
To Watchman during construction of build- ing	109.90	
To R. H. Sorrel, for extra brick work on Bldg	9.25	
For Superintending the finishing of Bldg...	350.00	
	<hr/>	6011.60
Total Expenditures		\$11,361.60
Deduct contract price to be paid Galloway & Son.....		9,864.44
		<hr/>
Amount due L. S. Nicolai under contract.....		\$1,497.16

The foregoing expenditures were made under the supervision of the architect who has audited the same and certified that the amounts are correct and that the balance shown is due and payable to the plaintiff under the contract, as provided by Article 5 thereof.

Pleas of Defendants Smith and Lambie.

Filed April 26, 1905.

In the Supreme Court of the District of Columbia.

At Law. No. 47624.

LAURENCE S. NICOLAI, Plaintiff,

vs.

THOMAS GALLOWAY and THOMAS F. GALLOWAY, Trading as "Galloway and Son," and THOMAS W. SMITH and JAMES B. LAMBIE, Defendants.

The defendants, Thomas W. Smith and James B. Lambie, for pleas says:—

1. That the plaintiff ought not to have or maintain his aforesaid action against them; because they say the said plaintiff hath not, from the time of the making of the said bond, been dammified in respect or by reason of *the* any matter, cause or thing in the condition of said bond, and this they are ready to verify, wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action against them.

2. And for further plea, these defendants say that the alleged abandonment by Galloway and Son of work on the plaintiff's house was due to his own fault, in this, that the plaintiff made frivolous objections to the slightest fault in the materials furnished to his contractors for said house, often having the same rejected without cause, and in this, that he constantly interfered with the
18 men employed on the work by Galloway and Son, and thereby caused delay and additional expense to said contractors, Galloway and Son.

3. And for further plea, these defendants say that at the time, Galloway and Son abandoned work on the plaintiff's house he withheld from his contractors, money enough to have completed his house, according to the terms of said contract.

4. And for a further plea, these defendants say that after Galloway and Son abandoned work on the plaintiff's house, he (the plaintiff), finished the same in a manner different from the plans and specifications, and thereby exceeded the contract price.

S. T. THOMAS,

Attorney for Defendants Smith and Lambie.

Thomas W. Smith and James B. Lambie, defendants in the above entitled cause, being first duly sworn, depose and say: that they deny the right of the plaintiff to recover against them, the whole or any part of his claim; that whilst it is true the plaintiff and the defendants Galloway and Son, on December 10, 1903, executed the contract mentioned in the plaintiff's declaration, it is not true that the plaintiff observed and kept all the covenants and conditions therein contained on his part to be kept and performed, but on the contrary they say he therein made default, as will hereafter be more particularly stated. Affiants also deny that after Gallo-

19 way and Son abandoned work on the plaintiff's house, he (the plaintiff) was "compelled to, and with the approval of the defendants did complete said brick dwelling" on the contrary they say the plaintiff, without such approval, voluntarily proceeded to finish his house, and finished it, as we are informed and believe, and expect to prove at the trial of this action, in a more expensive style than was provided for in his contract with Galloway and Son, and thereby and for no other reason, exceeded the contract price.

These affiants further say they are informed and believe and expect to prove at the trial of this action that the failure of Galloway and Son to finish the plaintiff's house was due to his own fault in that the plaintiff is of an irritable disposition and most difficult to please; that he made persistent and often wholly groundless objections to materials supplied to Galloway and Son for his house, causing the same in many instances to be rejected without good reason; that he constantly interfered with the men employed by Galloway and Son on the work, all which caused as much as three months' delay, and entailed great loss on Galloway and Son, notwithstanding which however, when Galloway and Son were practically forced, by the improper conduct of the plaintiff, to abandon work on his house, 65 per cent. of the work necessary to complete it, had been done and the plaintiff then had in hand \$4,864, being about fifty per cent. of the contract price, which was more money than was necessary to complete his house according to the terms of said contract.

Furthermore affiants say that no mechanics' liens in respect of materials contracted for by Galloway and Son for the plaintiff's house, have been established.

20 Wherefore they say they owe the plaintiff nothing, and that he is not entitled to recover against them in this action.

THOS. W. SMITH.

JAMES B. LAMBIE.

Subscribed and sworn to before me this 26 day of April, 1905.

C. COLDEN MILLER,

[SEAL.]

Notary Public, D. C.

Joinder of Issue.

Filed June 13, 1905.

In the Supreme Court of the District of Columbia.

At Law. No. 47624.

LAWRENCE S. NICOLAI, Plaintiff,

vs.

THOMAS GALLOWAY and THOMAS F. GALLOWAY, Trading as Galloway & Son, and THOMAS W. SMITH and JAMES B. LAMBIE, Defendants.

The plaintiff joins issue upon each and all of the pleas of the defendant- filed in the above entitled cause.

LECKIE, FULTON & COX,

Attorneys for Plaintiff.

21 *Plaintiff's Amended Declaration and Bill of Particulars.*

Filed January 17, 1906.

In the Supreme Court of the District of Columbia.

At Law. No. 47624.

NICOLAI, Plaintiff,
vs.
GALLOWAY ET AL., Defendants.

Leave of the Court first being had and obtained, the plaintiff amends his Declaration and Bill of Particulars filed in the above entitled cause, by inserting in said Bill of Particulars the following items to be charged as expenses incurred by him on account of matters, which should have been provided by Galloway & Son:

One Kitchen Range, called for in the Specifications, at a cost of	\$40.00
One Gas Range, called for in the Specifications, at a cost of.	20.00
One Laundry Stove, called for in the Specifications, at a cost of	10.00
Total	\$70.00

LECKIE, FULTON & COX,
Attorneys for Plaintiff.

22 *Memorandum.*

January 17, 1906.—Verdict for Defendants.

Motion for New Trial Filed; Overruled and Judgment.

Supreme Court of the District of Columbia.

FRIDAY, February 16, 1906.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * *

At Law. No. 47624.

LAWRENCE S. NICOLAI, Pl'tf,
vs.
THOMAS GALLOWAY and THOMAS F. GALLOWAY, Trading as Galloway and Son, THOMAS W. SMITH and JAMES B. LAMBIE, Def'ts.

Upon consideration of plaintiff's motion for a new trial filed herein, it is ordered that said motion be and is hereby overruled; and

judgment on verdict is ordered; whereupon it is considered and adjudged that the plaintiff herein take nothing by this action; that the defendants go hereof without day, be for nothing held, and recover of plaintiff their costs of defense to be taxed by the Clerk, and have execution thereof; from the foregoing judgment
 23 the plaintiff by his Attorneys in open Court, notes an Appeal to the Court of Appeals and prays that bond be fixed; whereupon it is ordered that the plaintiff herein furnish bond for costs on such appeal in the sum of One Hundred Dollars (\$100) with surety or sureties to be approved by the Court.

Memorandum.

February 28, 1906.—Appeal bond filed.

Memorandum.

March 23, 1906.—January Term extended thirty-eight (38) days to settle Bill of Exceptions.

Memorandum.

April 10, 1906.—Time to file Transcript of Record in Court of Appeals extended to May 1st, 1906.

24 *Bill of Exceptions Made Part of Record.*

Supreme Court of the District of Columbia.

TUESDAY, April 24th, 1906.

Session resumed pursuant to adjournment, Hon. Thomas H. Anderson, Justice, presiding.

* * * * *

Before Judge Barnard.

No. 47624. At Law.

LAWRENCE S. NICOLAI, Pl'ff,

vs.

THOMAS GALLOWAY ET AL., Def't.

Comes now the plaintiff herein by his attorneys of record and submitting to the Court the Bill of Exceptions taken at the trial of this cause, prays that the same be signed and made of record now for then which is accordingly done.

Bill of Exceptions.

Filed April 24, 1906.

In the Supreme Court of the District of Columbia.

At Law. No. 47624.

LAWRENCE S. NICOLAI, Plaintiff,

vs.

THOMAS GALLOWAY ET AL., Defendants.

Be it remembered that at the trial of this cause before the Honorable Mr. Justice Barnard, one of the Associate Justices of the Supreme Court of the District of Columbia, and a jury regularly impanelled and sworn to try the issues pending between the plaintiff and the defendants, the plaintiff offered evidence to prove the plans and specifications prepared for the erection of the residence of the plaintiff, the contract between the plaintiff and the Contractors, Galloway & Son, a true copy of which is annexed to the Declaration and marked "Exhibit A Contract," and also the Bond signed by the Contractors and by the defendants, Smith and Lambie, as sureties, a true copy of which is annexed to the Declaration marked "Exhibit B Bond;" all of which said specifications, contract and bond were admitted in evidence.

He further offered evidence to prove that said plans and specifications had been prepared by B. Stanley Simmons, who, as architect, had charge of the letting of contracts for the building of said house, and who performed all the duties required by the contract during the building of the same; that in a few days after said contract was executed, the Contractors entered upon the performance thereof, and continued, with numerous intervals of delay, until about the last of May or first of June 1903, when they abandoned and ceased work upon said building; that after various futile efforts by the architect to have them resume and continue the work, in accordance with the specifications and contract, he sent the following notice to the plaintiff:

"JULY 27TH, 1903.

Mr. L. S. Nicolai.

DEAR SIR: This is to notify you that the contractors, Galloway & Son, have repeatedly violated Articles 4, 5, 6 and 7 in the contract for your residence on Columbia Road, between Eighteenth Street and Ontario Avenue, in Lanier Heights, and that you are at liberty to complete the building at their expense.

Very respectfully yours, B. STANLEY SIMMONS."

And immediately thereafter, the plaintiff sent the Contractors the following notice:

“WASHINGTON, D. C., *July* 28, 1903.

Messrs. Galloway & Son, 1351 Kenyon Street and 712 O St. N. W.,
Washington, D. C.

GENTLEMEN: Mr. B. S. Simmons, the architect named in our contract of the 10th of December, 1902, for the construction of my residence on Columbia Road, has certified to me that you have repeatedly violated Articles 4, 5 and 6 of said Contract, and that such violation on your part is sufficient ground for me to terminate your employment as contractors for the said work and complete the building at your expense.

I, therefore, hereby notify you that unless you shall immediately enter upon said work and prosecute the same with promptness and diligence, and in every respect comply with the agreements and conditions of the contract to the satisfaction of the architect and in such manner as shall meet with his approval, I shall after ten days from
27 the date hereof, enter upon the premises and take possession of all material, tools and appliances found thereon, and complete the building at your expense, as provided under the terms of the contract.

Respectfully yours,

L. S. NICOLAI.”

that the contractors failing to respond or resume work on said building, and the plaintiff having waited upon them until about August 14th, 1903, without any response whatever, the architect, at the suggestion of the plaintiff, sent the following notice to each of the defendants, Smith and Lambie, the sureties upon the Bond.

“AUGUST 14TH, 1903.

DEAR SIR: This is to inform you that Messrs. Galloway & Son, who had the contract to build for Mr. L. S. Nicolai a certain residence on Columbia Road, between Sixteenth Street and Ontario Avenue, have not only failed to complete said residence in accordance with said contract and specifications, but have absolutely abandoned the same, and are unable to resume it. In consequence of such failure and abandonment on the part of Messrs. Galloway & Son, the said contract has been declared terminated between them, and Mr. Nicolai, in accordance with the terms of said contract, and Messrs. Galloway & Son have likewise, in accordance with the said contract, been notified of said termination.

Under said contract, Mr. Nicolai is authorized to complete the said building at the expense of Messrs. Galloway & Son, but before exercising that right, I notify you, as Bondsmen of Messrs. Galloway & Son under said contract, not only of the termination of said contract, as hereinbefore stated, but also to say that if you desire, as such Bondsmen, to make any arrangements with Mr. Nicolai and myself about the completion of said building, in accordance with the terms of said contract and specifications, you will please call on me on or before the 18th day of August, 1903. In the event you do not call or make arrangements by said date, it will be considered that you do not care to make any arrangements with respect to the completion of said work, and I shall proceed to have such building completed in accordance with the terms of said contract without further notice.

Very respectfully yours,

B. S. SIMMONS.”

28 That before the architect took steps to complete the building according to said notice, he waited until after August 24th, 1903, on or about which date he received the following reply to his aforesaid notice of August 14th, 1903:

"WASHINGTON, D. C., August 24, 1903.

B. Stanley Simmons, Esq., Architect, Corner Ninth & F Streets, N. W. City.

DEAR SIR: Your letters of the 14th instant to Thomas W. Smith and James B. Lambie, notifying them that Galloway & Son, contractors for the erection of a house for Mr. L. S. Nicolai on Columbia Road, had abandoned the work and calling upon them, as sureties to finish the building, have been referred to me for attention.

In reply I have to say Messrs. Smith and Lambie will decline to take up the work of finishing Mr. Nicolai's house and will leave that matter to you and Mr. Nicolai, under the terms of the contract.

I should have answered your letter sooner, but for the fact that I had gotten the impression, not dispelled until to-day, that Messrs. Smith and Lambie had personally advised you of their attitude in the premises.

Thanking you on behalf of my clients for your courtesy in the matter, I remain,

Very truly yours,

S. T. THOMAS."

That at the time the Contractors abandoned their work, they had received \$5,000 of the contract price, which left a balance of \$4,854.40 in the hands of the plaintiff, and at that time about 50% of the work had been done; that Galloway & Son had not paid all bills for the material and labor they had employed in said building, and some of the Contractors and material men, to wit, Irwin J. French & Company and the Adams Munroe Manufacturing Com-

29 was due them under their said contract, which said notices were offered in evidence; and other labor and material men were threatening to file like notices; that until the plaintiff would agree to pay or secure such sub-contractors of Galloway & Son for work and material already furnished for said house, they were unwilling to finish their contracts, or do anything further upon said building; that the architect solicited from various other parties, bids in their respective lines, for the completion of plaintiff's house, but he received bids from only a few of such parties, to wit, Barber & Ross William White, Warren & Dyer and W. H. Chappel; whose bids related only to such lines of work and material as said bidders respectively furnished; that owing to labor conditions then existing, he had great difficulty in getting bids, because there were outstanding a large number of unpaid claims for labor and material already furnished to said unfinished building, and other material men and contractors would not bid upon the work, until the amount due and owing to those who had already worked upon said building were paid or secured; that when the architect figured up the amount of money that was left of the contract price, he discovered he could not com-

plete said building within the contract price, unless all parties accepted 72% of their unpaid claims and bids; that the architect then sought to bring about such an adjustment, and found only three of the number who were willing to accept seventy-two cents on the dollar; that as a result of such conditions, and in order to complete said building, and prevent the sub-contractors from filing notices of

30 their liens, the plaintiff was compelled to pay in full nearly all the unpaid bills that were due from Galloway & Son to their sub-contractors, and, as all the sub-contractors and material men were entitled to liens against the property, it was better and cheaper to settle without law suits than with them; that these efforts consumed considerable time, and, as a result thereof, the work was not resumed until the latter part of September 1903, and was not finished until January 1904; that everything that could possibly be done to finish the house within the contract price, was done by the architect and the plaintiff, and the arrangements the architect made for the completion of the building, were the best he could possibly make, and the building was completed at the lowest price at which the same could be completed, under the conditions that then existed, and in keeping with the usual customs and methods of building in this District; that some roofing was done on the house when Galloway & Son quit work; that Fanning had some slate on the house when Galloway & Son quit; that Landon had, up to that time, done about \$25 worth of work; that all of the work done by Fahey & Company and by C. P. Kluckhuhn and Brother, was done after Galloway & Son quit work; that Martin had done about \$138 worth of work, and that the Adams Munroe Manufacturing Company had delivered a small amount of lumber on the ground, and that the objections made by the plaintiff, from time to time, to the work and material which Galloway & Son were putting into the building, were generally sustained by the specifications and the architect.

The plaintiff then offered further evidence tending to prove that he had paid, under the contract, for the completion of said
31 building, the amounts set out in the Bill of Particulars, and the sum of \$70 included in the amendment to the Bill of Particulars, which amounts were expended in accordance with the contract, and were necessary to be paid by the plaintiff to complete the building under the contract, and were the correct amounts, with the following exceptions:

On the item to Barber & Ross for tile work in building, \$103, was paid.....	\$97.85
On the item to French & Company, on account of plumbing, \$1079.35, was paid.....	1061.00
On the item to William H. Dyer, for dressed lumber, \$32.03, was paid \$23.00.....	23.00
On the item to Adams Munroe Company, \$593.44, was paid	569.89
The item to Cyrus B. Reese, for radiators, and extra work, \$156.60, was stricken out by agreement.	

Upon cross-examination, plaintiff's witnesses gave further testimony tending to prove as to the amount of \$420 paid George W. Turnburke, for painting said building, that at the time Turnburke undertook such painting, some painting had already been done, but the same was in a soiled and damaged condition, that it was necessary to put three coats of paint over that which had already been done, in order to make it a first-class job; that the estimate of Turnburke for painting the house was \$298, in addition thereto, he charged and received, \$45 for finishing the floors in hard oil, work which
32 Galloway & Son was to have done, but failed to do; that he received \$10 for finishing up the mantels, and \$65 for cleaning down and painting a brick wall, which was not finished, according to the contract, by Galloway & Son, who, in putting up the wall, had used different colored mortar, instead of uniform black mortar, as the specifications called for, and in addition had left the wall wholly unclean from the droppings of mortar, instead of cleaning it thoroughly, as they were required under the specifications to do, making it necessary to employ a man to clean this wall and to paint and pencil the same, so as to give it the appearance contemplated in the contract; and that he also received \$2.00 for an extra coat of paint on porch rail that had been damaged, making the total of \$420; all of said work being necessary to make a first-class job, as contemplated by the contract and specifications. Whereupon, Counsel for the defendants, objected to the said items of \$45, \$10, \$65 and \$2, and asked that they be stricken out. Whereupon the Court sustained said objection, and directed that said items be stricken out; to which ruling of the Court, the plaintiff, by his Counsel, then and there duly objected and excepted.

Further testimony was also offered tending to prove that the plaintiff paid the Irwin J. French & Company, for plumbing, the sum of \$1061; that French & Company's original bill to Galloway & Son was \$1235; that at the time Galloway & Son abandoned the work, French & Company had done from one-third to one-half of the plumbing work under the contract; that Galloway had paid them nothing whatever on account; that the boiler, which Galloway had French & Company to put into the house was smaller than was
33 required by the specifications, and had afterwards to be removed, and a new one put in, which cost about \$45 more than the one removed; that the amount of radiation which Galloway & Son put into the house was also short of what the specifications called for, and had to be changed after the plaintiff had moved into the house.

Thereupon, the plaintiff, LAWRENCE S. NICOLAI, being called as a witness, gave evidence tending to prove that he paid to E. J. Hannan, the sum of \$21.78 for repairing work done by French & Company, and which had been intended to be included in the Bill of Particulars in the amount due French & Company, in addition to the \$1061 paid direct to them, which sum of \$21.78 for repairs was paid within twelve months after French & Company had finished the work; that Galloway & Son, who had employed French & Company

to do the work, had guaranteed the work for one year; that the repairs had to be done within one year, on account of the defective condition of the work, and, that under the guarantee made by Galloway & Son, plaintiff claimed the right to charge the sureties of Galloway & Son for said repairs. Whereupon Counsel for the defendants objected to said item of \$21.78, and asked the Court to strike out the same, and the Court sustained the objection and ordered the said item stricken out; to which ruling and order of the Court, Counsel for the plaintiff then and there duly objected and excepted.

Further testimony was also offered, in reference to the item of \$185 paid Fahey & Company for concreting and excavating, tending to prove that at the time Galloway & Son abandoned the work, none of said concreting and excavating had been done; that Fahey
34 & Company undertook to do said work for the sum of \$185, but that they had not completed the work; that plaintiff had paid them \$150, and was under contract to pay them the additional sum of \$35 when the work was completed. Whereupon Counsel for the defendant objected to the item of \$35, on the ground that it had not been paid, and the Court sustained said objection and directed that the item of \$35 should be stricken out; to which ruling of the Court, the plaintiff, by his Counsel, duly objected and excepted.

Further testimony was also offered, in reference to the item of \$108 paid C. P. Kluckhohn's contract with Galloway & Son for such work was \$150, and that the architect settled with him on the basis of seventy-two cents on the dollar.

Further testimony was also offered in reference to the item of \$569.89 paid to Adams Munroe Manufacturing Company, for dressed lumber, to show that this amount was 72% of the original bill of the said Adams Munroe Company; that with the exception of a small amount of dressed lumber delivered at the building by the Adams Munroe Company, the rest of the lumber shipped by them was on storage with the Merchants Transfer & Storage Company, and had never been delivered at said building, and that the said Adams Munroe Company had filed a lien in the Clerk's Office for the amount due them for the dressed lumber aforesaid, which had been shipped to Galloway & Son, but on account of which nothing had been paid by Galloway & Son.

Further testimony was also offered, in reference to the item of \$835.50 paid R. Z. Hazell for carpenter work.

35 On Cross-examination of plaintiff's witnesses, it appeared that the said amount was made up of items as follows:

Finishing carpenters' work, according to plans and specifications	\$720.00
For sand-papering and cleaning work, and assorting mill work to be returned, to the Adams Munroe Manufacturing Company.....	39.50
For planing floors	75.00
For work done for plumber.....	1.00
Total	<u>\$835.50</u>

that the lumber so separated and cleaned was lumber shipped as aforesaid by the Adams Munroe Manufacturing Company and was on storage with the Merchant's Transfer and Storage Company, and by reason of the fact that it had been on storage a long time, a great deal of it became so damaged that it was necessary to separate the damaged from the undamaged lumber, to sand-paper and clean up part of it, and return the damaged part to the Adams Munroe Manufacturing Company; but not withstanding this, the original bill of the Adams Munroe Manufacturing Company had been reduced nearly \$300. Whereupon Counsel for the defendants objected to the said item of \$39.50, and asked the Court to strike out the same, which objection was sustained by the Court, and the said item ordered to be stricken from the Bill of Particulars; to which ruling of the Court, counsel for plaintiff then and there objected and excepted.

Further testimony was also offered, in reference to the item of \$109.90 paid watchman during construction of building, tending to show that the watchman to which this amount was paid, was employed as such upon said building by Galloway & Son while
36 they were engaged in the building of said house, and left in charge of the same by them when they quit; that after Galloway & Son abandoned said work he was continued by the plaintiff at the same price that they had paid him, to wit \$2.50 per week; that his services were necessary for the protection of the plaintiff's house, and that the expense of a watchman was provided for in the estimate which Galloway & Son made for building and completing the plaintiff's house, and formed a part of the contract price; that it was contemplated by the contract, and necessary, usual and customary to employ a watchman in such cases. Whereupon counsel for the defendants moved the Court to strike out the item of \$109.90 paid to the watchman, on the ground that the plaintiff was not authorized, under the contract, to employ a watchman, and the sureties were not liable for the same, and the Court granted said Motion, and ordered that the said item be stricken out; to which ruling and order of the Court, the plaintiff, by his Counsel, then and there duly objected and excepted.

Further testimony was also offered, in reference to the item of \$350, charged by the plaintiff for superintending the finishing of the building, tending to show that the work, for which said charge, for the plaintiff's personal services in looking after and superintending the completion of said building, was made, was necessary to complete said building, and was done according to the contract; \$350 was a fair and reasonable charge for the services plaintiff rendered in connection with the completion of said building, the same being services that the Contractors would have had to render, had they finished the building, as per their contract. Whereupon counsel
37 for the defendants objected to the item of \$350, which the plaintiff claimed for his personal services as aforesaid, on the ground that the same was not authorized by the contract, and asked the Court to strike out said item, which objection the Court sustained, and, accordingly, ordered the said item to be

stricken out; to which ruling and order of the Court, the plaintiff then and there, by his Counsel, duly objected and excepted.

And, subsequently, the plaintiff having been recalled as a witness, in his own behalf, was asked by his Counsel to state what services he had rendered in the matter of looking after and superintending the work, for which he had charged the \$350 set forth as the last item in his Bill of Particulars. Whereupon Counsel for the defendants objected to the witness testifying on the ground that the sureties were not liable to the plaintiff for any such services; which objection the Court sustained, and to which ruling of the Court Counsel for the plaintiff duly objected and excepted.

Whereupon the plaintiff having concluded his testimony in chief, the defendants, Lambie and Smith, produced as a witness, in their behalf, THOMAS F. GALLOWAY, one of the Firm of Galloway & Son, who, being first duly sworn, gave evidence tending to prove that they could not suit the plaintiff in the manner in which they were executing the work; that he made many objections, and was very disagreeable. Whereupon plaintiff's Counsel objected to such testimony, and moved that the same be stricken out, on the ground that it was wholly immaterial, irrelevant and incompetent, but the

38 Court overruled said objection; to which ruling of the Court Counsel for the plaintiff duly excepted.

Whereupon Counsel for the defendants, asked said witness the following question: Did Mr. Nicolai's conduct have any effect in delaying the work? To which question plaintiff's Counsel objected, on the ground that it was not only leading, irrelevant and immaterial, but that, under the terms of the contract, ample provision had been made for the protection of the Contractors against any delays caused by the fault of the plaintiff, which objection the Court overruled; to which ruling of the Court, Counsel for plaintiff took exception; and thereupon, the witness answered: "It did."

The witness gave further testimony tending to prove that the Adams Munroe Manufacturing Company, were to furnish the dressed lumber and mill work for Mr. Nicolai's house; two wagon loads of it had been delivered at the building; the remainder was not delivered at the building, but was stored with the Merchants' Transfer and Storage Company, in the name of Galloway & Son, until it could be used, and for want of room at the building.

On cross-examination, the witness testified that the architect usually condemned the material which Nicolai complained of, and could not name any objection made by the plaintiff to the material, which the architect did not sustain.

Thereupon COURTNEY R. JONES was called as a witness on behalf of the defendants, and being first duly sworn, gave evidence tending to prove that the plaintiff frequently objected to the material

39 being put in the house, and interfered with the men; to which testimony plaintiff's Counsel objected, and moved to strike out the same, on the ground that it was immaterial, irrelevant and incompetent, and that for any and all delays occasioned in

the progress of the work, through plaintiff's fault, the contract had made ample provision for protecting the contractors, but the Court overruled said objection; to which ruling the plaintiff's Counsel duly excepted.

Said witness then gave further evidence tending to prove that plaintiff's manner was abrupt and violent. Whereupon plaintiff's Counsel objected and moved to strike out the same, on the ground stated in the preceding objection, but the Court overruled said objection and motion; to which ruling, Counsel for the plaintiff duly excepted.

Whereupon, GEORGE W. JOHNSON was produced on behalf of the defendants, and being first duly sworn, gave evidence tending to prove that he was a painter; that he gave a bid to Galloway & Son to paint plaintiff's house, for \$200, which was accepted; that he had done about \$55 worth of work when Galloway & Son quit.

Thereupon FRED J. KLUCKHUIS was called on behalf of the defendants, and being first duly sworn gave evidence tending to prove that he was an electrician, and submitted a bid to Galloway & Son for \$150 for electrical work; that about one-half of his work was done when Galloway & Son abandoned the work, and that he finished his work, under a contract with the architect, whereby he received from the plaintiff 72% of the contract price, or \$108.

Thereupon JAMES L. PARSONS was called as a witness on behalf of the defendants, and being first duly sworn, gave evidence tending to prove that he had had wide experience in building
40 houses of all kinds in the City.

Whereupon the following question was asked said witness by defendant's Counsel: Where a house, similar to the one in question, to wit, three stories and basement, and twenty feet front, and where from 65 to 70% of the work thereon had been done, and which house when completed would cost Nine Thousand Eight Hundred and Sixty-four Dollars, workmanship good, and materials first-class, and where there remained in the owner's hands \$1,864 of the contract price, in your opinion would that sum so remaining in the owner's hand be sufficient to complete said house?

Plaintiff's Counsel objected, on the ground that

1. The question of what was sufficient to complete this house was not one for expert testimony; that the jury could determine that question, as well as any expert could, and that it was a question for the jury to determine from the facts established by the evidence, and not from opinion;

2. That if it were a proper question for expert testimony, the witness had not qualified as such;

3. The question failed to state the facts as disclosed by the evidence with respect to the work which had actually been done upon said building; and

4. The question failed to disclose anything as to how the house was to be finished, so that it was impossible for the witness to de-

termine from the question whether or not the amount of money remaining in the owner's hands was sufficient to complete same.

41 Which objections the Court overruled, and to which ruling of the Court, plaintiff's counsel then and there excepted.

Whereupon the witness answered, that in his judgment, it was sufficient, provided the house was to be finished in the way that houses costing that amount are usually finished.

Whereupon plaintiff's Counsel objected to the answer of the witness, and moved to strike out same, on the grounds that it was non-responsive to the question, and showed that it was not predicated upon any information which had been disclosed to the witness by the question propounded and that there was nothing in the testimony of any witness produced in the case, to show that this house was to be finished as any ordinary house. But, the objection of Counsel to the answer of witness, and motion for striking answer out, the Court overruled. To which ruling of the Court, plaintiff's Counsel excepted.

Whereupon the defendant's Counsel asked said witness the following question: "If there remained \$1,864 of the contract price, could you have finished the house for that sum?" To which question, Counsel for the plaintiff objected, on the grounds that it had not been shown that this witness had any knowledge whatever of what was to be done in order to finish or complete the house, in accordance with the plans and specifications, and, therefore, there was nothing to show that the witness was competent to determine any such fact, even for himself; nor was there anything to show

42 how said witness expected to, or would finish said house according to the plans and specifications, which objection the Court overruled, and to which ruling of the Court, Counsel for plaintiff then and there took exception.

Whereupon the witness answered: "I should say yes." The witness having completed his testimony, plaintiff's Counsel then moved to strike out all of the witness' testimony, because of the objections heretofore stated, and of its incompetency and inadmissibility. Which Motion the Court refused to grant, and to which ruling of the Court, Counsel for plaintiff took exception.

Thereupon THOMAS W. SMITH, one of the defendants, was called as a witness, who being first duly sworn, testified in substance as follows:

That he was in the lumber business, and had done a great deal of building. Whereupon he was then asked the following question by defendant's Counsel: If a house is finished to a point where it is ready for plastering, what per cent., in your opinion, of the work is done?

Whereupon Counsel for plaintiff objected, on the ground that such testimony was not expert testimony; that the witness had not qualified as an expert, or even as being familiar with the conditions that the house was in at the time same was abandoned by Galloway & Son, or what was to be done to finish same, as required by contract and specifications, and also that it was immaterial, even if competent

and proper for expert testimony. Which objection the Court overruled, and to which ruling of the Court, Counsel for the plaintiff then and there excepted.

43 Whereupon the witness answered: "About 60%." To which answer, Counsel for the plaintiff objected, on the grounds that it was immaterial and improper, and Counsel moved to strike out the answer, which objection and motion the Court overruled, and to which ruling of the Court, plaintiff's Counsel then and there excepted.

Whereupon said witness was asked the following question: If \$4,864 remained on hand, could you have finished the house for such sum? To which question, Counsel for the plaintiff objected, on the ground that as there was nothing to show in what manner or after what fashion the witness could, or would have finished the house, or that he knew how the same was to be finished, it was wholly improper and incompetent and inadmissible. Which objection the Court overruled, and to which ruling of the Court, Counsel for plaintiff then and there excepted. The witness answered: "Yes." To which answer, Counsel for plaintiff objected, on the same grounds, and moved to strike it out. The Court overruled said objection and motion, to which ruling of the Court, plaintiff's Counsel then and there excepted.

Thereupon MILTON DAVIS was called on behalf of the defendants, and being first duly sworn, testified in substance as follows:

That he was store-keeper for the Merchants Transfer and Storage Company. Whereupon Counsel for the defendants asked the witness whether or not the books of his Company showed any lumber or mill work shipped by the Adams Munroe Manufacturing Company, of Lynchburg, Virginia, stored with his Company in
44 the summer of 1904, in the name of Thomas Galloway & Son the lumber and mill work referred to, being the same for which plaintiff paid the Adams Munroe Company the sum of \$569.89, according to Bill of Particulars. Thereupon Counsel for Plaintiff asked Counsel for defendants what was the purpose of said testimony. Defendants' Counsel stated that it was for the purpose of showing that the said lumber and mill work had been delivered to Galloway & Son, and belonged to them and not to the Adams Munroe Manufacturing Company, to which question Counsel for plaintiff objected, on the ground that the question as to whether or not the lumber belonged to Galloway & Son or the Adams Munroe Manufacturing Company had been fully and finally adjudicated in the Bankruptcy proceedings in the case of Galloway & Son, said proceedings being known as Bankruptcy No. 313, which proceedings were then called to the attention of the Court, and that the question of title having been finally adjudicated in that proceeding, it was improper in this cause for the Court to review such proceedings, which objection the Court overruled, on the ground that the sureties on the Bond of Galloway & Son were not parties to said Bankruptcy proceedings. To which ruling of the Court, Counsel for the plaintiff then and there duly excepted, and thereupon the witness answered that the books of the said Transfer & Storage Company showed

that there was on storage a lot of lumber and mill work shipped by the Adams Munroe Manufacturing Company, in the name of Galloway & Son; that two loads of the lumber had been delivered at a house on Columbia Road; that four loads of such lumber had been stored with said Company in the name of Galloway & Son, to
45 which answer Counsel for the plaintiff objected and moved to strike out the same, for the reasons set forth in the objection to the question, but the objection and motion were overruled by the Court, and the plaintiff then and there duly excepted.

And the defendants, having offered further testimony tending to show that at the time Galloway & Son abandoned the work, most of the lathing and about \$50 worth of painting had been done; that about 50% of the plumbing had been finished; that the window sashes were fitted and were being glazed; that about \$100 worth of work was required to finish the stone work in the building; that about \$600 was necessary to finish the brick work, and that about 65% of the house had been completed, and that the same could have been finished by Galloway & Son for the \$4,864 remaining in the hands of the plaintiff, closed their case.

And the plaintiff, having called as a witness in rebuttal B. STANLEY SIMMONS, the said witness, on cross-examination, gave evidence tending to show that the work on the house of the plaintiff was about one-half completed when Galloway & Son abandoned the same; that about one-half the contract price remained in the hands of the plaintiff, and that if the plaintiff had not been compelled to pay the subcontractors of Galloway & Son for work done upon said building and material furnished for the same, and had not been compelled to buy the material and mill work from Adams Munroe Manufacturing Company or from some one else, in order to complete the same, the building could have been finished, according to the specifications and plans, within the contract price.

46 Whereupon the plaintiff, by his Counsel, offered in evidence the proceedings in the Bankruptcy case of Thomas F. Galloway & Son, known as Bankruptcy No. 313. To which Counsel for the defendants objected, on the grounds that the sureties of Galloway and Son were not parties to said proceedings, and the Court sustained said objection, to which ruling of the Court, the plaintiff by his counsel duly excepted. The following is a copy of certain parts of said record and proceedings in the said Bankruptcy cause, which Counsel for the plaintiff called to the special attention of the Court, which referred to the same lumber and mill work on account of which the aforesaid payment was made to the Adams Munroe Manufacturing Company by the plaintiff, and which Counsel for plaintiff claimed showed that the question of ownership as between Galloway & Son and the Adams Munroe Manufacturing Company had been finally adjudicated, and could not, therefore, be tried again in this cause:

In the Supreme Court of the District of Columbia.

In re Bankruptcy GALLOWAY & SON.

It is now stipulated and agreed between the receiver in this case and Leo Simmons, Attorney for the Adams Munroe Company, a corporation, that certain building materials now stored with the Merchants Parcel & Storage Company shall be delivered to Lawrence S. Nicolai, the owner of the house for which said materials were manufactured, and the value of said materials held by
47 said Nicolai until the Court can decide in this case, whether or not said materials belong to said Galloway & Son, the bankrupts in this case, or the said Adams Munroe Company. And if it be found that said Adams Munroe Company are the owners of same, or that it is entitled to the fund by reason of its mechanics' lien allowed by law upon the property for which they were made, then so far as the receiver is concerned, said sum may be paid to said Simmons as Attorney for said Adams Munroe Company.

LEO SIMMONS,

L. P. LOVING, *Receiver*.

I approve of this,

LAWRENCE S. NICOLAI.

In the Supreme Court of the District of Columbia.

In re GALLOWAY & SON, Bankrupt.

Bankruptcy. No. 313.

This cause coming on to be heard on a question raised by agreement entered into between the trustee of the bankrupt's estate and the Adams-Munroe Company, a corporation, (a copy of which agreement is set forth on pages 45 and 46 of the testimony taken thereon) as to the ownership of certain building materials mentioned therein; and the testimony having been fully considered and counsel for the
48 respective parties having been fully heard, it is, this 24th day of August, 1904, adjudged, ordered, and decreed that said building materials shipped sometime in July, 1903, by the said Adams-Munroe Company to Galloway & Son for Nicolai building and stored with the Merchants Transfer and Storage Company, D. C., at the time of the execution of said agreement, were the property of the said Adams-Munroe Company by virtue of the exercise by them of their right to stop said goods in transit.

And it is further ordered that the trustee in bankruptcy shall have until the third day of September, 1904, inclusive, to file a petition for a review of the above order.

(Signed)

EDWARD S. McCALMONT,

Referee in Bankruptcy.

In the District Court of the United States for the District of Columbia.

In the Matter of GALLOWAY & SON, Bankrupt.

Bankruptcy. No. 313.

Lucas P. Loving, Trustee of the estate of said bankrupts represents unto this Honorable Court that the Referee in his findings as to the ownership of the property claimed by Munroe & Company and found in the possession of the bankrupts at the time of his appointment as Trustee erred in his findings as to the law and facts, and respectfully asks that all papers may be certified for review by the Justice sitting as a Bankruptcy Court.

(Signed)

L. P. LOVING, *Trustee*.

49 In the Supreme Court of the District of Columbia.

In re GALLOWAY AND SON, Bankrupt.

In Bankruptcy. No. 313.

This cause coming on to be heard upon the report and finding of the referee in the matter of the controversy between The Adams Munroe Manufacturing Co. and the trustees in bankruptcy, respecting certain materials consigned by the former for use in the building of Lawrence S. Nicolai, said report and finding having been certified to the Court, and counsel for the respective parties having been heard, and the case duly considered, It is, this 6th day of December A. D. 1904, adjudged and ordered that said report and finding be and the same is hereby in all respects ratified and confirmed, with costs to said The Adams-Munroe Manufacturing Co.

(Signed)

THOS. H. ANDERSON, *Justice*.

The plaintiff then offered the following prayers, which were refused by the Court; to the refusal of each of which the plaintiff, by his Counsel, then and there excepted:

1.

50 Upon default of Galloway & Son, under their contract to construct the building, the plaintiff Nicolai was authorized to enter upon the premises and complete the building, and in the completion of said building, he was authorized to use such means as were necessary and proper to that end; and if the jury find from the evidence, that the employment of a watchman on the work was reasonable and proper under the circumstances of the case, as being calculated to expedite the work on the building, or to prevent the loss of materials, or other loss and injury, then they are instructed that the plaintiff was authorized to employ such watchman at a reasonable price and the sureties on the Bond would be liable to the plaintiff for the amount paid to such watchman for his services.

2.

In determining whether it was proper to employ the watchman in completing, under the contract, the work abandoned by Galloway & Son, the jury may take into consideration the fact that a watchman was provided for in the contract—and employed by Galloway & Son, if they shall so find while they were working under the contract.

3.

The jury may also take into consideration the fact, if they shall so find, that it is customary among contractors and builders, to employ watchmen over buildings, to prevent loss of material or other injury to material or to the building during the process of construction.

4.

If the plaintiff, after he entered upon the completion of the building, under the contract, rendered personal services in superintending the construction of said building, and if such services were
51 necessary and proper, or such services as it would have been proper for him to hire some other person to perform, then he is entitled to charge a reasonable price for such services rendered by him, just as if he had employed some other person, and paid him for such services.

5.

The jury are instructed that the subcontractors under the law had a lien against the property of the plaintiff for work performed and materials furnished under Galloway & Son, General Contractors, in the erection of the plaintiff's house for which sub-contractors had not been paid at the time that Galloway & Son abandoned the work; that it was the duty of Galloway & Son under their contract to remove such lien and in default on their part the Bondsmen of Galloway & Son were responsible for such removal, so that the said plaintiff would receive his house free from any and all such liens. If the plaintiff was compelled to pay the unpaid claims of sub-contractors in order to remove such liens and in order to complete his house according to the purpose and intent of the contract, then Galloway & Son and their Bondsmen are liable to the plaintiff therefor, and if by reason of the payment of such claims the plaintiff was compelled to pay out more for the completion of his house than the funds which he had in hand amounted to, then the plaintiff is entitled to a judgment for such excess.

6.

If the jury find from the evidence that Galloway & Son quit and abandoned the building in question before it was completed,
52 and that there were sub-contractors, who had furnished material for, and performed labor upon the said uncompleted building, for which they had not been fully paid by Galloway & Son, and that the plaintiff, after due notice to Galloway & Son and their Bondsmen, took possession of the said building to complete the

same according to the contract and specifications, and that the said Nicolai in the completion of said contract was compelled to pay to said sub-contractors the amount due them for work done before Galloway & Son quit and abandoned said work, as well as for the work done by them after Galloway & Son abandoned the work, in order to secure the completion of said building, the plaintiff is entitled to recover the amount so paid to such subcontractors.

And thereupon the defendants offered the following prayers, which were granted by the Court; the fourth, sixth and seventh of said prayers being granted over the objection and exception of the plaintiff:

I.

Upon the whole evidence in this case, the jury are instructed that the plaintiff is not entitled to recover, and that their verdict should be for the defendants.

(Refused.)

II.

53 If the jury believe from the evidence that the failure of Galloway & Son to complete the plaintiff's house, within the time stipulated, was due to his wrongful acts and conduct, such as unreasonable interference with his contractors, and employees on the work, and unwarranted objections to work done on the building, and to materials brought to the building for use in its construction, these were valid excuses for non-performance of the contract, and the plaintiff is not entitled to recover on the bond sued on, and their verdict should be for the defendants.

(Refused.)

III.

If the jury believe from the evidence that when Galloway & Son quit work on the plaintiff's house, the plaintiff withheld from them \$4,864, and that that was money enough to have completed his house, according to the plans and specifications, then the plaintiff is not entitled to recover in this action, and their verdict should be for the defendants.

Granted.

IV.

If the jury believe from the evidence that after Galloway & Son quit work on the plaintiff's house, the plaintiff took up the work and completed his house himself, and that in doing so he departed from the plans and specifications, and thereby exceeded the contract price, then he is not entitled to recover in this action, and their verdict should be for the defendants.

Granted.

54

VI.

If the jury believe from the evidence that the item of \$593.44 alleged to have been paid by the plaintiff to Adams Monroe Manufac-

turing Company, for dressed lumber, was for lumber and mill-work sold and delivered by said Company to Galloway & Son, to be used in building the plaintiff's house, part of which had been delivered to Galloway & Son at the plaintiff's house, before they quit work on it, and part, at their request, to the Merchants' Transfer & Storage Company, then said materials belonged to the plaintiff, and the plaintiff is not entitled to recover the value of the same against the defendants in this action.

Granted.

VII.

This being an action by the plaintiff to recover the aggregate amount of money alleged to have been expended by him in finishing his house, after his contractors, Galloway & Son, quit work on the same, the jury are instructed that the plaintiff is not entitled to include in his alleged expenditures the value of any work done on his house by the sub-contractors of Galloway & Son, before the latter quit work, which Galloway & Son, had not paid for, nor the value of any materials delivered to Galloway & Son, for use in the plaintiff's house, and which were upon the plaintiff's premises at the time Galloway & Son quit work, but that the plaintiff, if entitled to recover anything, is limited to such moneys as he actually paid for labor and materials
 55 necessary to finish his house, according to the plans and specifications therefor, after Galloway & Son quit work upon it.

Granted.

VIII.

If the jury believe from the evidence that Galloway & Son quit work on the plaintiff's house, because of threats and assaults by the plaintiff upon their sub-contractors, and employees, then Galloway & Son were justified in abandoning work on said house, and the plaintiff is not entitled to recover in this action.

(Refused.)

IX.

In regard to the clause in the contract between the plaintiff and Galloway & Son, permitting the plaintiff to terminate said contract, and employ others to complete his house, the jury are instructed that in availing himself of this privilege, it was the duty of the plaintiff to proceed economically, and if they believe from the evidence that he did not do so, but caused his house to be finished in a more extravagant manner than required by the plans and specifications, he cannot charge the actual cost of completion against the contractors and their sureties, but only the reasonable cost.

Granted.

56 Thereupon the plaintiff excepted to the granting of the defendants' Fourth Prayer, on the ground that there was no evidence to show that the plans and specifications had been departed from.

He objected to the Sixth Prayer, on the ground that the Court had finally adjudicated the question as to the title of the lumber and mill-

work referred to therein, and had decided that the same was the property of the Adams Munroe Manufacturing Company, and never belonged to Galloway & Son, and on the further ground that the plaintiff, under his contract with Galloway & Son, had no right to take possession of the said lumber, the same not having been delivered on the premises, where the building was under construction.

And he objected to the Seventh Prayer of the defendants, on the ground that the plaintiff was entitled to recover all he was compelled to expend in excess of the contract price, in order to complete
57 said house; that the Bondsmen were given the opportunity to complete said house for the amount of the contract price remaining in the hands of the plaintiff and refused to do so, and that the plaintiff was entitled to have his house, free from liens.

Thereupon the Court charged the jury substantially as follows:

That they should disallow the plaintiff's claim of \$350 for his individual services, which he rendered in looking after and seeing that his house was completed according to specifications and plans; that such services were not contemplated by the clear intent of the contract between the plaintiff and Galloway & Son, and the defendants, Lambie and Smith, as sureties on Galloway & Son's bond, could not be charged therewith; likewise, the item of \$109.90, which the plaintiff paid for services of a watchman pending the completion of said building, should be disallowed; also the balance of \$35.00 due Fahey & Company; likewise the item of \$39.50 paid to Hazell for sand papering and cleaning and assorting mill work, should be disallowed; also \$65.00 paid to Turnburke for cleaning down and putting in proper condition back wall of plaintiff's house; likewise the item of \$2.00 paid to Turnburke for painting damaged porch rail; \$10.00 paid to Turnburke for finishing up mantels; \$45.00 paid to Turnburke for finishing up floors of which the Court instructed the
58 jury should be disallowed; also the sum of \$36.00 paid to Kluckhuhn; and also the \$21.78 paid to E. J. Hannan for repairing plumbing work done by French & Company, should be disallowed.

And the Court further instructed the jury substantially as follows: That if they believed from the evidence submitted in the case, that the item of \$568, which plaintiff paid the Adams Munroe Manufacturing Company, was for lumber which belonged to Galloway & Son, then they should disallow that claim, as under the contract, Nicolai had the right to take possession of all the material which belonged to Galloway & Son, and use it in said building. The evidence in this case showed that the Adams Munroe Manufacturing Company had shipped this material to Galloway & Son, and that it was delivered to them and stored with the Merchants' Transfer & Storage Company, in this city, in the name of Galloway & Son; that if they believed that was a fact, then it was the property of Galloway & Son, and the plaintiff in this case had the right to take possession thereof, and was not compelled or required to pay the Adams Munroe Company; if the plaintiff paid the Adams Munroe Company, he did so at his risk, and the Bondsmen would not be liable therefor.

The Court further instructed the jury substantially as follows: That in respect to the Irwin J. French & Company's bill of \$1061, there was evidence tending to show that they had done about 50% of

their work in the matter of installing the heating plant and plumbing in plaintiff's house at the time Galloway & Son abandoned their work; that there was about \$500 due French & Company from Galloway & Son, under the contract which Galloway & Son had with

59 French & Company to install said plumbing and heating; that under the law, in force in this District, French & Company had not enforced their lien against the plaintiff's premises, and, therefore, plaintiff was not liable therefor to French & Company for such sum as was due them for work done at the time Galloway & Son quit, and that the Bondsmen therefore, would not be liable for the amount due from Galloway & Son to French & Company for said work and material; that if the plaintiff assumed to pay the debts of Galloway & Son before French & Company enforced any lien against the plaintiff's property, then he paid such debts at his own risk, and the jury should disallow such sum as they found to be due French & Company for work and material furnished up to the time Galloway & Son quit the plaintiff's house, which, according to the evidence, was about \$500.

The Court further charged the jury substantially as follows: That if these items, which the Court had instructed the jury to disallow, in conjunction with the sum which the plaintiff paid the Adams Munroe Company, aggregated more than the amount of the plaintiff's claim, as sued for, then their verdict should be for the defendants, but for no sum; but, if they found, after deducting the amount of said items from the amount which the plaintiff was suing for, there was a balance in favor of the plaintiff, then their verdict should be for such balance.

Whereupon counsel for the plaintiff then and there and in the presence of the jury, and before the jury retired, excepted to each and every of the instructions so given by the Court, and particularly to those directing the jury to disallow the items enumerated, and also the instruction relating to the material shipped by the Adams Munroe Company, and that relating to the claim of French & Company.

60 Thereupon the jury retired to consider their verdict.

After the noting of the said exceptions hereinbefore set forth, and making the same a part of the record, which is also made a part hereof, and because the matters and things hereinbefore recited are not matters of record, and in order that the plaintiff may have his case reviewed on appeal by the proper Court, the plaintiff, by his Attorneys, moves the Court to sign and seal this, his Bill of Exceptions, to have the same force and effect as if each and every one of said exceptions had been separately signed and sealed, which motion is by the Court granted, and thereupon the plaintiff tenders this, his Bill of Exceptions, and requests the Court to sign and seal the same according to the Statute in such cases made and provided, and it is accordingly done, now for then, this the 24th day of April, A. D. 1906.

JOB BARNARD, *Justice*.

61

Memorandum.

April 25, 1906.—Time to file Transcript of Record in Court of Appeals further extended to June 1st, 1906.

Designation to Clerk for Preparation of Transcript.

Filed April 25, 1906.

In the Supreme Court of the District of Columbia.

Law. No. 47624.

NICOLAI

v.

GALLOWAY ET ALS.

To the clerk of the supreme court of the District of Columbia:

The plaintiff hereby designates the following parts of the record to be included in the transcript to be transmitted to the Court of Appeals on the appeal taken and perfected in this cause:

Declaration, Exhibits "A" and "B" and Bill of Particulars (omitting affidavit under 73rd Rule); the four Pleas of Defendants, Smith and Lambie, filed April 23th, 1905; Joinder of Issue upon said Pleas; Amendment to Declaration and Bill of Particulars, filed January 17th, 1906; Memorandum of Verdict; Judgment and Appeal; Memorandum of Appeal Bond; Memorandum of Order extending *term* to settle Bill of Exceptions; Bill of Exceptions
62 and Order making Bill part of Record; Memorandum of Orders, extending time to file transcript in Court of Appeals; Copy of this Notice.

LECKIE, FULTON & COX,
Attorneys for Plaintiff.

Service of copy of above Order this 25th day of April, A. D., 1906, acknowledged.

S. T. THOMAS,
Attorney for Defendants, Smith & Lambie.

63 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 62, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 47624 at law, wherein Lawrence S. Nicolai, is Plaintiff and Thomas Galloway &c., *et als.*, are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington in said District, this 15th day of May, A. D. 1906.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1679. Lawrence S. Nicolai, appellant, *vs.* Thomas Galloway *et al.* Court of Appeals, District of Columbia. Filed May 26, 1906. Henry W. Hodges, clerk.